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IN THE

Supreme Court of the United States

October Term, 1968.

No. 704.

CITY OF PHILADELPHIA,

Petitioner

v.

ELLEN HENNIGAN, Administratrix of the Estate of JAMES C. HENNIGAN, Deceased

and

ROGER A. JOHNSON, Administrator of the Estate of ROBERT C. WILSON, Deceased

and

BONNIE RIDDICK, Administratrix of the Estate of JOHN RIDDICK, Deceased

and

ATLANTIC REFINING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS HENNIGAN AND JOHNSON IN OPPOSITION.

JAMES E. BEASLEY,
1405 Locust St.,
Philadelphia, Pa. 19102
Counsel for Respondents Hennigan & Johnson.

BEASLEY, ALBERT, HEWSON & CASEY,
1405 Locust St.,
Philadelphia, Pa. 19102
Of Counsel.

CAHILL, CAHILL & LYNCH,
Bankers Securities Bldg.,
Philadelphia, Pa. 19102
Of Counsel.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

INDEX.

	Page
I. Opinions Below	1
II. Jurisdiction	1
III. Questions Presented	1
IV. Counter Statement of the Case	2
V. Reasons Why Petition Should Be Denied	5
1. There Is No Lack of Jurisdiction and No Conflict With Any Other Decision of the Third Circuit	5
2. There Is No Conflict With Any Applicable Pennsylvania Law	7
(a) The Pipeline Act	7
(b) Control	8
(c) Punitive Damages	8
VI. Conclusion	8

TABLE OF CITATIONS.

Cases:	Page
Barker v. City of Philadelphia, 134 F. Supp. 231 (E. D. Pa. 1955)	7
Cherry v. City of Philadelphia, 293 F. 2d 926 (3rd Cir. 1961)	7
Corabi v. Auto Racing, Inc., 264 F. 2d 784 (3rd Cir. 1959)	6
Jaffee v. Philadelphia & Western R. Co., 180 F. 2d 1010 (3rd Cir. 1950)	6
Jamison v. Byers, 330 F. 2d 657 (3rd Cir. 1964)	7
McGrath v. Pennsylvania Sugar Co., 282 Pa. 265, 127 A. 780 (1925)	7
Mecon v. Fitzsimmons Drilling Co., 284 U. S. 183 (1931)	6
Pender v. Raggs, 178 Pa. 337, 35 A. 1135 (1896)	7
Philadelphia Electric Co. v. James Julian, Inc., 425 Pa. 217, 228 A. 2d 669 (1967)	7
Quinones v. Township of Upper Moreland, 293 F. 2d 237 (3rd Cir. 1961)	7
Spinozzi v. Lavino, 243 F. 2d 80 (3rd Cir. 1957)	7
Stork v. Philadelphia, 199 Pa. 462, 49 A. 236 (1901)	7
Van Der Schelling v. U. S. News & World Report, Inc., 213 F. Supp. 756 (E. D. Pa. 1963), affirmed 324 F. 2d 956 (3rd Cir. 1963)	6
Wiggins v. City of Philadelphia, 331 F. 2d 521 (3rd Cir. 1964)	7

Authority:	
Restatement, *Torts*, 2d § 416	7

Statute:	
28 U. S. C. Section 1254(1)	1

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

I. OPINIONS BELOW.

The District Court denied petitioner's motions for new trial and judgment in an opinion which appears at pp. 34-75 ad of the Appendix to the Petition. It is reported at 282 F. Supp. 667 (1968). The Opinion of the Court of Appeals for the Third Circuit is at pp. 77-79 ad of the Appendix. It is as yet unreported.

II. JURISDICTION.

It is not disputed that there is jurisdiction under Title 28, U. S. C. Section 1254(1).

III. QUESTIONS PRESENTED.

1. In a properly founded diversity case, where there were no trial errors and where the evidence overwhelmingly supported a finding that a defendant was negligent in one aspect of the case and wilfully wrong in another, was not this defendant's motion for judgment and new trial properly denied?

2. In a negligence case, where the District Court and the Court of Appeals predicate their decision upon applicable state law and there thus is not and cannot be any conflict between Circuits, within the Third Circuit itself or between the State and the Third Circuit, will a Petition for Certiorari lie?

IV. COUNTER STATEMENT OF THE CASE.

Preliminarily, Respondents point out that the Petition for Letters (Appendix XI) appearing at pp. 85-86 ad of the Petition are nowhere part of the record certified to this Court, nor are they any part of the record below in either the District Court proceedings or the proceedings before the Third Circuit. Petitioner's argument in this regard is completely and absolutely *dehors* the record.

Respondents further note that jurisdiction below was predicated upon diversity of citizenship, the facts as to which were affirmatively made of record (12a, 577a, 1924a, N. T. 1322).

On August 22, 1962, plaintiffs' decedents, employees of Driscoll Construction Company, were killed in an explosion while working on the construction of a sewer tunnel in the City of Philadelphia. The explosion resulted from the ignition of petroleum vapors which had accumulated in the tunnel. The existence of the vapors and their explosive characteristic was known generally to the City before construction began and specifically for at least two months prior to the explosion.

The sewer construction project was located under a street adjacent to the petroleum storage facilities of Atlantic, and in a general area of oil refinery and storage facilities. (The City filed a third-party complaint against Gulf Oil Corporation, but this complaint was dismissed with prejudice before trial and is not involved in the present appeals.)

The City of Philadelphia drafted the plans and specifications for the tunnel and the contract between the City and Driscoll (the contractor for the project) provided that an inspector from the City was to be present at all times

during the actual construction work to assure and direct compliance with the plans and specifications as drawn by the City.

The soil in the area surrounding the tunnel site selected by the City was heavily saturated with petroleum products. The tunnel as designed ran through the water table, and hydrocarbons which were in the soil rose to the top of the water table. As a consequence, heavy concentrations of gas filled the tunnel. The log book available to the City inspector showed that dangers continually arose because of the presence of the highly inflammable gas in the tunnel, necessitating the use of high-powered blowers and the wearing of gas masks. A sample of liquid taken from the tunnel by the City's inspector over two months before the explosion indicated the presence of highly inflammable compounds ignitible at room temperature. An "emergency, rush" memorandum from the City's laboratory describing the extreme danger involved was ignored by the City.

The evidence was clear that the City, which knew of the concentration of petroleum wastes in the ground before the project was designed, was negligent both in designing the sewer tunnel as well as in failing to order proper precautions with regard to the accumulation of ignitible vapors in the tunnel. The jury found the City negligent on both theories, and found that it acted with reckless disregard for the safety of the decedents in failing to take any proper precautions against the known danger of fire and explosion.

The personal representatives of three of the decedents brought diversity actions in the district court under Pennsylvania's Wrongful Death and Survival Statute against Atlantic Refining Company and the City of Philadelphia. Atlantic and the City filed cross claims against each other, and Atlantic filed a third-party complaint against Driscoll.

The third-party complaints were dismissed by stipulation, and the cases against Atlantic and the City were submitted to a jury on special interrogatories. The jury found: (a) the City negligent and it had acted with reckless disregard for the safety of others; (b) that the City's negligence was the proximate cause of the explosion; (c) that Atlantic was not negligent; and (d) that the decedents had neither been contributorily negligent or assumed the risk of the type of accident which caused their deaths. The District Court entered judgment against the City and denied the cross claims of both the City and Atlantic.

The District Court in denying the City's motion for judgment n.o.v. or in the alternative for a new trial painstakingly reviewed the multitudinous claims of the defendant and in an exhaustive opinion found them without merit. The Court of Appeals found that the District Court committed no error and noted that its discussion of the legal problems which the City presented to it amply justified its judgment.

The judgment of the District Court was affirmed.

V. REASONS WHY PETITION SHOULD BE DENIED.

1. There Is No Lack of Jurisdiction and No Conflict With Any Other Decision of the Third Circuit.

With regard to the *Johnson* aspect of this matter, the record—as noted heretofore—shows quite clearly the diversity of the parties. Respondents are quite at a loss to understand Petitioner's involvement of the *McSparran* and *Esposito* decisions as referring to the instant matter.

First, the Statute of Limitations in the instant matters ran on August 21, 1964. As was clearly noted by the Court of Appeals for the Third Circuit in *McSparran* (17-18ad):

> We recognize that many actions are now pending in the courts of this circuit in reliance on our earlier decisions. In many of these actions the statute of limitations may already bar the institution of new suits in the state courts although in some of them protective state court actions may have been filed. To apply the rule we have here announced to all pending and future actions indiscriminately would work great hardship on those who have relied on our prior recognition of artificial diversity jurisdiction. It is therefore appropriate to declare the new rule to be prospective.
>
> It is true that we deal here with a jurisdictional question. But the notion that "jurisdiction" is a subject of some magical quality so that a decision against jurisdiction prevents according recognition to other relevant considerations must yield to the knowledge that it is our construction of the statute which determines in the present case whether jurisdiction exists or is absent. The Supreme Court relatively early

recognized prospective overruling as a judicial technique of general application (Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U. S. 358 (1936)), and recently has restricted to prospective application some of its decisions on questions of constitutional law, an area long considered as much immune from prospective overruling as the area of federal jurisdiction. As we had occasion to say in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 377 F. 2d 776, 789 (3 Cir. 1967), reversed on other grounds, 392 U. S. 481 (1968): "Recent decisions of the Supreme Court in criminal cases have made it clear that the unrealistic theory that the law has always been what the latest case for the first time declares it to be, the so-called Blackstonian view, must yield to the practical realization that conduct had occurred in reliance on the earlier rules of law to the contrary."

Of course, the *Johnson* action was with absolute propriety under the aegis of *Jaffee v. Philadelphia & Western R. Co.*, 180 F. 2d 1010 (3rd Cir. 1950); this Court's decision in *Mecon v. Fitzsimmons Drilling Co.*, 284 U. S. 183 (1931); and *Corabi v. Auto Racing, Inc.*, 264 F. 2d 784 (3rd Cir. 1959), which opinions represented the law as of the institution of the *Johnson* action.

Respondents further are at a loss to understand the inclusion of *Van Der Schelling v. U. S. News & World Report, Inc.*, 213 F. Supp. 756 (E. D. Pa. 1963), affirmed 324 F. 2d 956 (3rd Cir. 1963), within the Petition. *Van Der Schelling* did *not* involve the overruling of any prior decisional law and was not an action predicated upon then existing standards which standards became changed after the right to bring the action in another forum became foreclosed. It is not inconsistent with *McSparran* or *Esposito* and is neither modified nor overruled by them.

Petitioner refers to some sort of immunity. There is none. The acts of the City were proprietary *and* there was a clear waiver (42-53ad, 64ad). Suffice it to say State and Court of Appeals' decisions amply justified the entry of judgment. For Pennsylvania authorities see: *Pender v. Raggs,* 178 Pa. 337, 35 A. 1135 (1896); *Stork v. Philadelphia,* 199 Pa. 462, 49 A. 236 (1901); *McGrath v. Pennsylvania Sugar Co.,* 282 Pa. 265, 127 A. 780 (1925); Restatement, *Torts,* 2d § 416, *Philadelphia Electric Co. v. James Julian, Inc.,* 425 Pa. 217, 228 A. 2d 669 (1967). For Third Circuit authorities see: *Spinozzi v. Lavino,* 243 F. 2d 80 (3rd Cir. 1957); *Quinones v. Township of Upper Moreland,* 293 F. 2d 237 (3rd Cir. 1961); *Jamison v. Byers,* 330 F. 2d 657 (3rd Cir. 1964).

Parenthetically, Petitioner is estopped from denying its liability in a Federal Court. It has appeared therein on many occasions in personal injury cases and has never before asserted this spurious claim. See, for example, *Cherry v. City of Philadelphia,* 293 F. 2d 926 (3rd Cir. 1961), where the City itself pursued the action; *Barker v. City of Philadelphia,* 134 F. Supp. 231 (E. D. Pa. 1955); and *Wiggins v. City of Philadelphia,* 331 F. 2d 521 (3rd Cir. 1964).

2. There Is No Conflict With Any Applicable Pennsylvania Law.

(a) The Pipeline Act.

The Pipeline Act is of no moment. First, there was no evidence that the product was Atlantic's (1961a) and the Act has not even inferential application. Secondly, the negligence of the City as declared by the jury was a superseding cause and thus relieved Atlantic of its purported negligence (55-65ad). Thirdly, the jury found as fact that

Atlantic was not negligent (69ad). Finally, the Act has no application in the *Hennigan-Johnson v. City* aspect of the matter and plays no part in their recovery against the City or in the City's defense to their actions. Hence it is improperly raised in an attempt to affect their recovery.

(b) Control.

The question of control was resolved by the facts and cannot now be questioned by the defendant. The law of Pennsylvania is exceptionally clear (41-51ad).

(c) Punitive Damages.

We note here that this issue was never raised by the Petitioner in the Court of Appeals. The City did not charge the District Court with substantive error with regard to this clear aspect of the case and, in fact, assumed their propriety. Petitioner did not discuss these damages in its brief in the Court of Appeals and presented no authority nor reasoning contrary to their assessment. The issue was not even argued before the Court of Appeals. It was clear that defendant then agreed with the opinion of the District Court. It is equally clear that this was a case for an assessment of such damage.

VI. CONCLUSION.

This is not a case for Certiorari. It is simply a negligence case decided under State law properly applied. The issues were of no great magnitude. There is no conflict between Circuits—indeed there could be no such conflict—and there is no conflict between the Third Circuit and the Courts of the Commonwealth of Pennsylvania. The Constitution of the United States is involved not at all.

The opinions below are concise, clear and dispositive of all the issues properly raised. Upon the foregoing considerations, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES E. BEASLEY,
Attorney for Respondents,
Hennigan and Johnson.

BEASLEY, ALBERT, HEWSON & CASEY,
Of Counsel.

CAHILL, CAHILL & LYNCH,
Of Counsel.